

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

DePuy Mitek, Inc.)	
a Massachusetts Corporation)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 04-12457 PBS
)	
Arthrex, Inc.)	
a Delaware Corporation, <i>et al.</i>)	
)	
Defendant.)	
)	

**DEFENDANTS ARTHREX, INC.'S AND PEARSALLS LTD.'S MOTION FOR
SUMMARY JUDGMENT OF NON-INFRINGEMENT AND OPPOSING DEPUY
MITEK'S MOTION FOR SUMMARY JUDGMENT OF INFRINGEMENT**

Pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, defendants Arthrex, Inc. ("Arthrex") and Pearsalls Ltd. ("Pearsalls") move this Court for an Order granting summary judgment of non-infringement.¹ Defendants further move this Court for an Order denying DePuy Mitek's motion for summary judgment of infringement.

This case involves a claim for infringement of U.S. Patent No. 5, 314,446 ("the '446 patent"). The accused products contain a coating, a material that is not identified in the asserted claims. Since the claims include the phrase "consisting essentially of," there is no infringement if the accused products include an ingredient not identified in the claim that materially affects the basic and novel characteristics of the claimed invention. Since the undisputed facts demonstrate that coating materially affects the basic and novel characteristics of the '446 patent, the inclusion

¹ Defendants are not certain that it is necessary to file a new motion for summary judgment in light of the Court's January 31, 2007 Order instructing the parties to submit a single brief. However, out of precaution, defendants submit this new motion.

of coating on the accused products precludes a finding of infringement. For these and other reasons, DePuy Mitek's motion for summary judgment of infringement should be denied.

The reasons in support of this Motion are included in the accompanying Memorandum in Support of Defendants Arthrex, Inc.'s and Pearsalls Ltd.'s Motion for Summary Judgment of Non-Infringement and in Opposition to DePuy Mitek's Motion for Summary Judgment of Infringement.

Dated: April 6, 2007

Respectfully submitted,

By: /s/Charles W. Saber

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Counsel for Defendants

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendants Arthrex, Inc.'s and Pearsalls, Ltd.'s Motion for Summary Judgment of Non-Infringement and Opposing DePuy Mitek's Motion for Summary Judgment of Infringement was served, via the Court's email notification system on the following counsel for Plaintiff on the 6th day of April 2007:

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